Supreme Court, U.S.
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No. 10-404

IN THE

Supreme Court of the United States

MALCOLM G. SCHAEFER,

Petitioner,

v.

JOHN R. MCHUGH, SECRETARY OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

REPLY BRIEF

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INTRODUCTION

The petition should be granted because the decision below turns on an important and recurring issue of administrative law – *i.e.*, whether a party challenging an agency's failure to follow its own regulations also bears the burden of proving prejudice - that has generated a deep and persistent conflict among the federal circuits.

In its Opposition ("Opp."), the government candidly acknowledges that there is "disagreement among the courts of appeals concerning when a showing of prejudice is necessary." Opp. 4. As Schaefer has demonstrated, the Ninth, Federal, and D.C. Circuits impose a burden on a claimant to demonstrate prejudice whenever challenging an agency's violation of its own regulations. Pet. 14-16. In contrast, the Second, Third, and Seventh Circuits, do not require a claimant to establish prejudice when an agency violates a regulation designed to protect individual constitutional or statutory rights. *Id.* at 16-18. Similarly, the Sixth Circuit does not require a claimant to demonstrate prejudice when an agency violates a regulation conferring important procedural rights and benefits. *Id.* at 18-19.

The government does not and cannot dispute that the conflict among the federal circuits is an important and recurring one. Instead, it argues that the circuit decisions do not squarely conflict because they did not involve the same regulations at issue in this case. That is wrong. The legal principle of administrative law set forth in the competing federal circuit decisions is not tied to a specific regulation or specific agency. Indeed, the D.C. Circuit's decision in this case holding that Schaefer was required to demonstrate prejudice from the Army's failure to

follow its regulations relies on prior decisions involving regulations promulgated by the Federal Aviation Administration. Pet. App. 6a (citing cases).

Moreover, as Schaefer has demonstrated, resolution of the conflict is outcome determinative because Schaefer would not have been required to establish prejudice if this case were litigated in the Second, Third, Sixth, or Seventh Circuits. Pet. 20-24. In the decision below, however, the D.C. Circuit denied relief because it concluded "Schaefer failed to show that he suffered any prejudice from the Army's alleged error." Pet. App. 6a. Contrary to the government's argument (Opp. 6-7), the decision below thus squarely implicates this deep circuit conflict.

Finally, the government cannot overcome (Opp. 4-5) Schaefer's showing that the D.C. Circuit's decision conflicts with this Court's precedent. For example, in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), the Court held that if the claimant could show the agency's violation of its regulation, "he should receive a new hearing," and, in so concluding, the Court did not require a showing that the agency would have reached a different result and, indeed, made clear that it was not reviewing "the *manner* in which discretion was exercised" by the Board. *Id.* at 268.

The Petition should be granted.

I. THERE IS A DEEP CONFLICT OVER WHEN A PARTY CHALLENGING AN AGENCY'S FAILURE TO FOLLOW ITS REGULATIONS MUST SHOW PREJUDICE.

In the petition, Schaefer demonstrated that there is a deep conflict among the federal courts of appeals on the issue of when a party challenging agency action

must demonstrate prejudice from the agency's failure to follow its own regulations. Pet. 14-20. The government acknowledges this divergence among the circuit courts, Opp. 4, but nevertheless argues that review should be denied, *id.* at 5-6. Its arguments should be rejected.

The government contends that the circuit cases identified in the petition "do not squarely conflict" because they "involved different regulations." Opp. 6. That argument is meritless. The legal standards set forth in the conflicting federal circuit decisions are not limited to the specific regulations or the specific agencies at issue. Rather, each court articulated a general rule of administrative law governing whether a claimant who shows that an agency's action was reached in violation of its regulations also bears the burden of establishing prejudice.

For instance, in *Leslie* v. *Attorney General of the United States*, 611 F.3d 171 (3d Cir. 2010), the Third Circuit established "a framework for determining when judicial relief for a regulatory violation must be premised upon a showing of prejudice." *Id.* at 177; *id.* at 178. It held "that violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief," *id.* at 178, and then applied that rule to the agency's failure to follow the immigration regulations at issue, *id.* at 179; see *id.* at 182 (concluding no showing of prejudice was required because the regulation protected the fundamental right to counsel at removal hearings).

Equally unpersuasive is the government's argument that "in two of the cases [cited by Schaefer], the courts ultimately required prejudice to

be shown." Opp. 6 (citing *Waldron* v. *INS*, 17 F.3d 511 (2d Cir. 1993), and *Martinez-Camargo* v. *INS*, 282 F.3d 487 (7th Cir. 2002)). In those cases, both the Second and Seventh Circuit established the legal principle that a claimant need not demonstrate prejudice for agency violations of regulations "promulgated to protect a fundamental right derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518; see *Martinez-Camargo*, 282 F.3d at 492. To be sure, in applying that principle, the courts ultimately concluded that "the exception to the prejudice requirement did not apply to the particular regulations at issue." Opp. 6. Those outcomes, however, do not undermine that the standard set forth by the D.C. Circuit is in direct conflict with those in these circuits. Indeed, on that point, the government concedes that the circuit courts are in "disagreement." *Id.* at 4.

II. THE CONFLICT AMONG THE FEDERAL COURTS OF APPEALS IS OUTCOME DETERMINATIVE IN THIS CASE.

1. Contrary to the government's argument (Opp. 4, 6-7), this case is an ideal vehicle for resolving this conflict. The petition demonstrates that this case would have been decided differently under the rule in the Second, Third, and Seventh Circuits, because the regulations at issue govern the proper manner for revoking an order discharging an individual from military service, and thus they protect fundamental rights "derived from the Constitution or a federal statute." *Waldron*, 17 F.3d at 518. Likewise, the decision would have been different in the Sixth Circuit because these Army regulations bestow important procedural rights and benefits on soldiers, and therefore no prejudice need be shown. See

Wilson v. *Comm'r*, 378 F.3d 541, 546-47 (6th Cir. 2004). Any doubt on this point is resolved by the Army's regulations, which expressly state that they are designed to "ensur[e] that the rights and interests of the Government and *the soldier* are protected." Army Reg. 635-40, ¶ 1–1(c) (emphasis added).

The government acknowledges that fact, in passing (Opp. 7), but insists that the regulations here do not protect constitutional or statutory rights or confer important procedural rights on soldiers because Personnel Command had "no meaningful role" and performed only a "ministerial" function. Opp. 7. That is wrong.

Under the Army regulations, Personnel Command is vested with authority to "issue needed orders or other instructions" for the Secretary of the Army. Army Reg. 635-40, ¶ 2–3(b). A "[r]equest for deviation from established discharge date or amendment or revocation of retirement orders for other than medical reasons will be submitted, *with justification*, to [Personnel Command]." Army Reg. 635-40, App. E–9(e) (emphasis added). As a result, the regulations require Personnel Command to evaluate the "justification" for deviating from a previously issued discharge order, and therefore its role cannot be merely "ministerial."

The government's argument also ignores Personnel Command's critical role under the Army's regulations establishing a carefully reticulated disability evaluation system that divides authority among four separate entities. That regulatory structure ensures a definitive determination on whether a soldier has been discharged and therefore would have the full panoply of constitutional protections afforded to civilians. See Pet. 21-22; see also Army Reg. 635-40,

¶¶ 4–9 to 4–24; DODD 1332.18 ¶ 3.2 (directing the Army to establish an evaluation system that "consist[s] of four elements: medical evaluation; physical disability evaluation, to include appellate review; counseling; and final disposition."). Indeed, it was by disregarding Personnel Command's role that the Army was able to deny Schaefer's status as a civilian, hold him under military control, and subject him to court martial proceedings. Pet. 9-11; Pet. App. 12a-16a; see *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 23 (1955) ("civilians are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution.").

As the government points out, Personnel Command may not alone, as one part of that four-part structure, "decide whether a soldier should be converted to civilian via discharge." Opp. 7. That, however, does not mean that Personnel Command's role in the decision regarding a discharge order is superfluous. To the contrary, under the Army's regulatory framework, action by Personnel Command may not be *sufficient* (by itself) to effectuate a discharge, but it is *necessary*.

The government quotes selectively from the Army's regulations to argue that the disability system regulations do not confer important procedural benefits to soldiers because they *also* promote "prompt disability processing" and "an effective and fit military organization" to the government. Opp. 7 (quoting, in part, Army Reg. 635-40, ¶ 1–1(a) and (c)). The full quotation confirms that the regulations are designed to protect both the government *and* individual soldiers: "The objectives of this regulation are to— ... Provide prompt disability processing while

ensuring that the *rights and interests of the Government and soldier are protected.*" Army Reg. 635-40, ¶ 1–1(c) (emphasis added). That the Army's regulations serve dual purposes – protecting soldiers *and* the government – does not diminish that they expressly provide disabled soldiers with important substantive and procedural rights. Under the standards set forth by the Second, Third, Sixth, and Seventh Circuits, the Army's violation of regulations designed to protect the rights and interests of soldiers would warrant relief without any additional burden of showing prejudice.

Finally, the government argues that the regulations at issue were merely "'adopted for the orderly transaction of business before [the agency].'" Opp. 7 (quoting *Wilson*, 378 F.3d at 547). The regulations quoted above reject that factual argument.

2. The government argues in the alternative that this case "would be a poor vehicle" for resolving the circuit split because the district court provided "an alternative ground for affirming the judgment below." Opp. 8. That argument is meritless.

The sole basis for the D.C. Circuit's decision is that Schaefer did not establish prejudice from the Army's failure to follow its regulations in revoking Schaefer's discharge. Pet. App. 6a. The D.C. Circuit expressly declined to address whether the regulations were violated. *Id.* ("We ... need not consider the former," *i.e.*, the Correction Board's conclusion "that the Army did not commit procedural error"); see also *Accardi*, 347 U.S. at 268 (remanding case for a determination whether the Board violated its regulations).

In all events, the government's argument is unavailing because the Army plainly violated its regulations. Indeed, the Correction Board recognized that under the Army's regulations only Personnel Command had authority to revoke Schaefer's discharge but justified its dismissal of those regulations by characterizing them as "outdated." Pet. App. 90a. Instead, the Correction Board approved of "policies and procedures in effect [that] were not contained in a regulation." *Id.* at 91a. In short, the government provides no persuasive "alternative ground for affirming the judgment below." Opp. 8.

III. CERTIORARI IS ALSO WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Finally, the government argues, on the merits, that the decision below correctly required a showing of prejudice as a prerequisite to judicial relief. Opp. 4. Specifically, the government points to a provision in the Administrative Procedures Act ("APA"), which provides that "due account shall be taken of the rule of prejudicial error," 5 U.S.C. § 706, and asserts that no decision of this Court "rejects or limits the prejudice requirement in this context." Opp. 4-5. This argument provides no basis for declining review.

First, the provision of the APA quoted by the government was adopted in 1947 and was, therefore, in force when this Court established the *Accardi* doctrine in 1954 and refined it in subsequent decades. As noted, in *Accardi*, the Court reversed and remanded the case to allow an evaluation whether the agency had failed to comply with its regulations while "emphasiz[ing] that [the Court is] not here

reviewing and reversing the *manner* in which discretion" may have been exercised by the agency. *Id.* at 268.* As the Third Circuit recently recognized, "*Accardi* teaches that some regulatory violations are so serious as to be reversible error without a showing of prejudice." *Leslie*, 611 F.3d at 178.

Some of this Court's "most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA." *United States* v. *Caceres*, 440 U.S. 741, 754 & n.19 (1979) (citing *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959)). As demonstrated in the petition, the cases noted by the Court are precisely the ones in which the Court did not require any showing of prejudice. Pet. 25 (discussing *Service* and *Vitarelli*). In *Vitarelli*, for instance, the Court required scrupulous obedience to the agency's regulations and declared that an agency's failure to follow them is "illegal and of no effect." 359 U.S. at 545.

Finally, to the extent that the government contends that this Court's decisions and those of a number of the federal circuits were wrongly decided in light of the language in Section 706 of the APA, that is a further basis for granting review in this case to

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* Legal scholars have already noted that although the procedural irregularities in some of the Court's cases "were quite arguably prejudicial, this cannot be said of" several of this Court's *Accardi* doctrine cases. Thomas W. Merrill, *The* Accardi *Principle*, 74 Geo. Wash. L. Rev. 569, 577–78 (2006). For instance, in *Yellin* v. *United States*, 374 U.S. 109 (1963), the Court reversed a contempt of Congress conviction based on "the Committee's failure to comply with its own rules" even though the Committee almost certainly would have denied the request had it been properly referred for decision. *Id.* at 114-21.

resolve that conflict. In all events, the "prejudicial error" provision in the APA cannot insulate an agency refusal to follow its regulations in a case, such as this one, where the regulations "confer important procedural benefits upon individuals." *Am. Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970) (distinguishing *Vitarelli* because it involved rules that "confer[red] important procedural benefits upon individuals"); see Pet. 26. The D.C. Circuit's imposition of a prejudice requirement in all circumstances – including those involving regulations that protect the rights of individuals – is incompatible with this Court's decisions. This Court should also grant the petition to resolve this conflict.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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